

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

BRIAN KERRY O'KEEFE,  
Plaintiff,

v.

EIGHTH JUDICIAL DIST. COURT, *et al.*,  
Defendants.

3:18-cv-00071-RCJ-CBC

**REPORT AND RECOMMENDATION  
OF U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Robert C. Jones, United States District Judge. This action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is Plaintiff Brian Kerry O'Keefe's application to proceed *in forma pauperis* (ECF No. 2) and his *pro se* first amended complaint (ECF No. 3). Having thoroughly reviewed the record, the Court recommends that the application to proceed *in forma pauperis* be granted. Furthermore, the Court recommends that the Amended Complaint be dismissed without prejudice and without leave to amend for the reasons stated below.

**I. IN FORMA PAUPERIS APPLICATION**

Based on the financial information provided with Plaintiff's application to proceed *in forma pauperis*, the Court finds that plaintiff is unable to pay the filing fee in this matter. (ECF No. 2). Accordingly, the court grants Plaintiff's application to proceed *in forma pauperis*.

**II. LEGAL STANDARD**

Applications to proceed *in forma pauperis* by *pro se* plaintiffs are governed by 28 U.S.C. §1915. This statute requires the Court to "dismiss the case at any time if the court determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant

1 who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(B)(i)-(iii). Dismissal of a  
 2 complaint for failure to state a claim upon which relief may be granted is provided for in  
 3 Federal Rule of Civil Procedure 12(b)(6), and this Court applies the same standard  
 4 under Section 1915(e)(2) when reviewing the adequacy of a complaint or amended  
 5 complaint. See *Hamilton v. Brown*, 630 F.3d 889, 892-93 (9th Cir. 2011). When the  
 6 Court reviews a complaint under this standard, it accepts as true all the plaintiff’s  
 7 allegations and construes the complaint in the light most favorable to the plaintiff. *Chubb*  
 8 *Custom Ins. Co. v. Space Systems/Loral Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). The  
 9 Court takes particular care when reviewing the pleadings of a *pro se* party, for a more  
 10 forgiving standard applies to litigants not represented by counsel. *Hebbe v. Pliler*, 627  
 11 F.3d 338, 341-42 (9th Cir. 2010). This Court is to “construe *pro se* filings liberally . . .  
 12 and to ‘afford the petitioner the benefit of any doubt.’” *Id.*

13 Although the standard is broad, it is not limitless. Despite the leniency afforded to  
 14 *pro se* plaintiffs, the Court need not accept as true conclusory allegations, unwarranted  
 15 deductions, or unreasonable inferences. *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969,  
 16 973 (9th Cir. 2004). Further, the complaint must contain more than a “formulaic  
 17 recitation of the elements of a cause of action;” it must contain factual allegations  
 18 sufficient to “raise a right to relief above the speculative level.” *Bell Atlantic Corp. v.*  
 19 *Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Stated  
 20 differently, the complaint must allege sufficient facts to state a claim “that is plausible on  
 21 its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)  
 22 (citing *Twombly*, 550 U.S. at 555).

### 23 **III. DISCUSSION**

#### 24 **A. Plaintiff’s First Amended Complaint**

25 Plaintiff is an inmate in the custody of the Nevada Department of Corrections  
 26 (“NDOC”), and currently housed at Lovelock Correctional Center (“LCC”) in Lovelock,  
 27 Nevada. (ECF No. 3 at 1). In his First Amended Complaint, Plaintiff has named as  
 28 Defendants the Eighth Judicial District Court *ex rel* Clark County (“Eighth Judicial

District”); Clark County District Attorney *ex rel* Clark County (“CCDA”); Senior District Judge Sally Loehrer (“Loehrer”); Deputy District Attorney Stephanie Graham (“Graham”); and Deputy Attorney General Matthew Johnson (“Johnson”). (ECF No. 3 at 2-3.) He alleges three claims for relief, pursuant to 42 U.S.C. §1983, for alleged violations of his Fourteenth Amendment rights to procedural due process, equal protection, and privileges and immunities (*Id.* at 4); and his Eighth Amendment rights to be free of cruel and unusual punishment. (*Id.*)

Plaintiff’s claims all arise from the underlying prosecution and conviction and of Plaintiff in Nevada State Court for burglary and the sentencing in that case. (See ECF No. 3 at p. 3). Specifically, these causes of action arise from what Plaintiff describes as the “repugnant verdict [which] was the result of an extortionate perversion of lawfully initiated criminal process to illegitimate ends,” and the “[slandorous] and [libelous] information filed [in his] PSI.” (*Id.* at 3.) He contends that the use of his criminal record for impeachment purposes during the underlying prosecution was defamatory and libelous, resulting in him being “deprived of [his] actual innocence,” and the imposition of an excessive sentence. (*Id.* at 3 and 9.) Plaintiff further contends that the Presentencing Investigation report, or “PSI”, specifically mentions a prior burglary conviction that was later reversed and remanded on procedural grounds; therefore, he has been placed at a higher recidivism rate and it will have an impact on his parole board hearing. (*Id.* at 3-8.)

For these alleged violations, Plaintiff seeks damages in excess of \$150,000 for slander *per se*, libel *per se*, and actual damages. (*Id.* at 9.)

## **B. Analysis**

42 U.S.C. §1983 aims “to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights.” *Anderson v. Warner*, 451 F.3d 1063, 1067 (9th Cir. 2006) (quoting *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir. 2000)). The statute “provides a federal cause of action against any person who, acting under color of state law, deprives another of his federal rights[,]” *Conn v. Gabbert*, 526 U.S. 286, 290, 119 S.Ct. 1292, 143 L.Ed.2d 399 (1999), and is “merely . . . the

1 procedural device for enforcing substantive provisions of the Constitution and federal  
2 statutes.” *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). Claims under §1983  
3 require the Plaintiff to allege (1) the violation of a federally protected right by (2) a person  
4 or official who acts under the color of state law. *Anderson*, 451 F.3d at 1067. Further, to  
5 prove a §1983 claim, the Plaintiff must necessarily establish each of the elements  
6 required to prove the Defendant’s infringement of the underlying substantive right.

7       However, a § 1983 lawsuit is not a backdoor through which a federal court may  
8 overturn a state court conviction or award relief related to the duration of a sentence.  
9 Section 1983 and “the federal habeas corpus statute . . . both provide access to the  
10 federal courts ‘for claims of unconstitutional treatment at the hands of state officials . .  
11 .[but] they differ[sic] in their scope and operation.’” *Ramirez v. Galaza*, 334 F.3d 850,  
12 854 (9th Cir. 2003) (quoting *Heck v. Humphrey*, 512 U.S. 477, 480, 114 S.Ct. 2364, 129  
13 L.Ed.2d 383 (1994)). Thus, federal courts must take care to prevent prisoners from  
14 relying on § 1983 to subvert the differing procedural requirements of *habeas corpus*  
15 proceedings under 28 U.S.C. §2254. *Heck*, 512 U.S. at 486-87; *Simpson v. Thomas*,  
16 528 F.3d 685, 695 (9th Cir. 2008). When a prisoner challenges the legality or duration of  
17 his custody; raises a constitutional challenge which could entitle him to an earlier  
18 release; or seeks damages for purported deficiencies in his state court criminal case,  
19 which effected a conviction of a lengthier sentence; his sole federal remedy is a writ of  
20 *habeas corpus*. *Edwards v. Balisok*, 520 U.S. 641, 648, 117 S.Ct. 1584, 137 L.Ed.2d  
21 906 (1997); *Heck*, 512 U.S. at 481; *Wolff v. McDonnell*, 418 U.S. 539, 554, 94 S.Ct.  
22 2963, 41 L.Ed.2d 935 (1974); *Presider v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36  
23 L.Ed.2d 439 (1973); *Simpson*, 528 F.3d at 692-93.

24       Under these principles, and for the following reasons, the Court recommends that  
25 the First Amended Complaint be dismissed without prejudice and without leave to  
26 amend. First, Plaintiff’s complaint plainly seeks money damages related to the duration  
27 and imposition of his state sentence. This necessarily implies a request for vacating  
28 state court judgment. A claim pursuant to § 1983 is not an appropriate vehicle for this

1 relief. *Heck*, 512 U.S. at 486-88. If Plaintiff wishes to recover under § 1983, he must  
2 first establish that the underlying conviction is invalid through a *habeas corpus* action.  
3 Second, Plaintiff's factual allegations are vague and conclusory. He contends the PSI  
4 used during the sentencing in his underlying state court proceedings contains inaccurate  
5 information. However, the First Amended Complaint offers little factual basis in support  
6 of these contentions. Even if the prospective damages were within the power of the  
7 District Court to grant, dismissal is nevertheless proper because Plaintiff does not state  
8 facially plausible claims. *Iqbal*, 556 U.S. at 678.

9 Finally, regarding the Eighth Amendment claim, Plaintiff has not stated a viable  
10 claim, even accepting as true his conclusory allegations. The canon of Eighth  
11 Amendment authority confirms that the aim of that provision is not to protect against  
12 punishment itself or the imposition of a sentence, when due to some error, a lesser  
13 sentence is merited. Instead, the Eighth Amendment proscribes types and manners of  
14 punishment so severe and brutal that they serve no legitimate penological purpose and  
15 offend "any standard of human dignity." *United States v. Bailey*, 444 U.S. 394, 423, 100  
16 S.Ct. 624, 62 L.Ed.2d 575 (1980). In other words, contentions that punishment is  
17 excessive because of an underlying procedural error speak not to the Eighth  
18 Amendment, but to the due process guarantees of the Fourteenth Amendment.  
19 Therefore, Plaintiff's Eighth Amendment claims fail on this additional basis.

#### 20 **IV. CONCLUSION**

21 The Amended Complaint improperly seeks remedy for allegedly unconstitutional  
22 conduct related to the duration of his state court conviction. The Court, therefore,  
23 concludes that dismissal without prejudice and without leave to amend is warranted.

24 The parties are advised:

25 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of  
26 Practice, the parties may file specific written objections to this Report and  
27 Recommendation within fourteen days of receipt. These objections should be entitled  
28

1 “Objections to Magistrate Judge’s Report and Recommendation” and should be  
2 accompanied by points and authorities for consideration by the District Court.

3 2. This Report and Recommendation is not an appealable order and any  
4 notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of  
5 judgment.

6 **V. RECOMMENDATION**

7 **IT IS THEREFORE RECOMMENDED** that Plaintiff’s application to proceed *in*  
8 *forma pauperis* (ECF No. 2) be **GRANTED**. Plaintiff shall not be required to pay an initial  
9 installment fee. The full filing fee shall still be due, pursuant to 28 U.S.C. §1915(b), as  
10 amended by the Prisoner Litigation Reform Act of 1996 (“PLRA”). Plaintiff shall be  
11 permitted to maintain this action to conclusion without the necessity of prepayment of  
12 fees or costs or the giving of security therefor. This order granting *in forma pauperis*  
13 status shall not extend to the issuance of subpoenas at government expense.

14 **IT IS FURTHER RECOMMENDED** that, even if this action is dismissed, or is  
15 otherwise unsuccessful, the full filing fee shall remain due, pursuant to 28 U.S.C. §1915.

16 **IT IS FURTHER RECOMMENDED** that, pursuant to 28 U.S.C. §1915(b), the  
17 Nevada Department of Corrections shall pay to the Clerk of the United States District  
18 Court, District of Nevada, 20% of the preceding month’s deposits to the account of Brian  
19 Kerry O’Keefe, **Inmate No. 90244** (in months that the account exceeds \$10.00) until the  
20 full \$350 filing fee has been paid for this action. The Clerk shall send a copy of this  
21 order to the attention of the Chief of Inmate Services for the Nevada Department of  
22 Corrections, P.O. Box 7011, Carson City, NV 89702.

23 **IT IS FURTHER RECOMMENDED** that Plaintiff’s Amended Complaint (ECF No.  
24 3) be **DISMISSED WITHOUT PREJUDICE, WITHOUT LEAVE TO AMEND**;

25 **IT IS FURTHER RECOMMENDED** that Plaintiff’s Motion for leave to file a Second  
26 Amended Complaint (ECF No. 6) be **DENIED** as futile; and  
27  
28

**DATED:** September 25, 2018.

  
UNITED STATES MAGISTRATE JUDGE